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**Statement**

**Congresswoman Sheila Jackson Lee**

**Congressional Briefing on the Scope of Executive Power Since 9/11:**

**Presidential Authority to Conduct Warrantless Electronic**

**Surveillance**

**Friday, January 20, 2006**

Let me first thank Mr. Conyers for holding this important hearing.

We are here today because the President of the United States has  
executed an order that allows the National Security Agency (NSA) to

monitor, without a warrant, the international, and sometimes domestic, telephone calls and e-mail messages of hundreds and possible even thousands of citizens and legal residents inside the United States.

I do not oppose the monitoring of telephone calls and e-mail messages when it is necessary for national security reasons. I oppose engaging in such monitoring without a warrant. We have a Foreign Intelligence Surveillance Court that was established for the sole purpose of issuing such warrants when they are justified. That court should have been allowed to decide whether the telephone calls and e-mail messages of American citizens and legal residents is justified by security needs. Doing this kind of surveillance without a warrant is illegal.

The day after this monitoring became public, President Bush admitted that he had authorized it but argued that he had the authority to do so. According to the President, his order was "fully consistent with my constitutional responsibilities and authorities." But his constitutional

duty is to "take care that the laws be faithfully executed" (Article II, Section 3); the law here clearly establishes well-defined procedures for eavesdropping on U.S. persons, and the fact is, President Bush ordered that those procedures not be followed. Further, from a statutory argument point of view, it is not credible that the 2001 authorization to use force provides authority for the President to ignore the requirements of FISA. It is very doubtful that the courts would sustain the President on this basis. From a constitutional stand point, the President can try to make a case, although it is weak, that he does have constitutional authority to conduct warrantless wiretaps of American citizens in the U.S. for national security purposes. Because the Supreme Court has never said he does not have this power, some regard it as an open question. However, passage of FISA seriously undermines this argument.

Moving forward, the technology of wiretapping is so invasive that it has been subjected to carefully crafted statutory controls. Ignoring

those controls and wiretapping without a court order is a crime (in fact, criminal violations of the wiretap statute were among the articles of impeachment that were drafted against President Nixon shortly before his resignation).

Unfortunately, although the law in this matter is clear, many Americans, faced with President Bush's bold assertions of "inherent" authority, will not know what to believe. The starting point for understanding surveillance law is the Fourth Amendment to the Constitution, which states clearly that Americans' privacy may not be invaded without a warrant based on probable cause. The United States Supreme Court has made it clear that this protection applies to government eavesdropping. Consequently, all electronic surveillance by the government in the United States is illegal unless it falls under one of a small number of precise exceptions specifically carved out in the law.

**After 9/11, Congress approved an Authorization to Use**

**Military Force against those responsible for the attacks in order to authorize the president to conduct foreign military operations such as the invasion of Afghanistan, but that resolution contains no language changing, overriding, or repealing any laws passed by Congress. In essence, President Bush had no authority to move forward with warrantless searches. The Authorization to Use Military Force does not authorize the president to violate the law against surveillance without a warrant.**

In fact, the Foreign Intelligence Surveillance Act (FISA) contains explicit language describing the president's powers "during time of war" and provides that "the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen days following a declaration of war by the Congress."

Consequently, even if we accept the argument that the use-of-force resolution places us on a war footing, warrantless surveillance would

have been legal for only 15 days after the resolution was passed on September 18, 2001.

The FISA law takes account of the need for emergency surveillance. The need for quick action cannot be used as a rationale for going outside the law. FISA allows wiretapping without a court order in an emergency; the court must simply be notified within 72 hours. The government is aware of this emergency power and has used it repeatedly.

In addition, the Foreign Intelligence court is physically located in the Justice Department building, and the FISA law requires that at least two of the Foreign Intelligence court judges reside in the Washington, D.C. area, for precisely the reason that rapid action is sometimes needed. If President Bush found these provisions inadequate, he should have taken his case to Congress and asked for the law to be changed, not simply ignored it.

